

Before the
FEDERAL COMMUNICATIONS COMMISSION
WIRELINE COMPETITION BUREAU
Washington, DC 20544

In the matter of Petition by Mediacom)
Communications Corporation for)
Declaratory Ruling Pursuant to)
Section 1.2(a) of The Commission's Rules)

WC Docket No. 14-52

COMMENT BY DTE ELECTRIC COMPANY
IN OPPOSITION TO PETITIONER'S REQUESTED DECLARATORY RULING

Statement of Interest

DTE Electric Company ("DTE Electric") is an investor-owned electric utility that generates and distributes electricity to 2.1 million customers in southeastern Michigan. With an 11,084 megawatt system capacity, the company uses coal, nuclear fuel, natural gas, hydroelectric pumped storage and renewable sources to generate its electrical output. Founded in 1903, DTE Electric is the largest electric utility in Michigan and one of the largest in the nation.

As mandated by the Michigan Public Service Commission ("MPSC"), DTE Electric makes its utility poles and other infrastructure (e.g., conduits and trenches) available to certain other users (i.e., cable operators) for attachment of cable and cable system facilities pursuant to "Joint Use Agreements" that impose asymmetric and nonreciprocal indemnification duties on the part of the attaching party. Hence, with regard to the Petition now pending before the Wireline Competition Bureau in WC Docket No. 14-52, DTE Electric is in a position analogous to that of Interstate Power and Light Company ("IPL"), and its joint user/cable operators are in a positions analogous to that of Mediacom Communications Corporation ("Mediacom"). Further, inasmuch as state

regulatory agencies frequently conform to policy set by their federal counterpart, it should be noted that, for purposes of this issue, the MPSC is in a position analogous to that of the Federal Communications Commission ("FCC").

DTE Electric, therefore, has a legitimate interest in the issue of whether contract terms imposing asymmetrical and nonreciprocal indemnification duties on an attaching party are deemed to not be a "just and reasonable" term and condition of attachment. Moreover, as set forth herein, it is DTE Electric's position that the declaratory ruling that Mediacom is seeking would result in the least efficient and least equitable system of allocating the costs associated with such attachment arrangements. Indeed, Mediacom is advocating a short-sighted approach that isolates individual transactions or occurrences from the larger class of costs of which those transactions are mere components, and arbitrarily separates the contractual allocation of risk by such indemnification provisions from the terms of price for use with which they are inextricably intertwined.

Joint Use Presents a Problem of Cost Allocation

One does not need to be familiar with the Coase Theorem¹ to recognize the flaw in Mediacom's position, although it would certainly help. In an economically efficient system, goods or services that are worth less than the cost to produce them will not be produced, whereas goods and services that are worth more than the costs to produce them will be produced. However, problems arise when the producer of goods or services is in a position to externalize one or more of the costs of production (i.e., make someone other than the producer of the good or service pay the cost or bear the burden). In such cases, goods or services might still be produced

¹ This theorem is commonly attributed to The University of Chicago's Nobel Prize laureate Ronald Coase, based on a portion of his 1960 paper *The Problem of Social Cost*.

even though their value is outweighed by their social cost (i.e., the aggregate of the costs to the producer plus the externalized costs), resulting in economic inefficiency. The Coase Theorem, postulates that, through bargaining (absent prohibitive transaction costs), such externalized costs will be re-allocated in the most efficient manner possible. Which is to say, all that the parties need is a clear definition of who has the right to do what, and the market will take care of the rest.

DTE Electric's ratepayers pay rates for electricity that represent the cost of providing electrical service, plus a reasonable return on the equity of DTE Electric's investors. Presumably, cable subscribers are charged monthly fees that represent the cost of providing cable television and communication services, plus some return on the equity of the investors of their cable provider investors. No one would dispute that DTE Electric's ratepayers should not have to pay, as a component of their electric bill, part of the costs of providing cable services to cable subscribers, nor should cable subscribers be charged fees for the costs associated with providing electrical service to DTE Electric's ratepayers.

Nonetheless, it would also be economically inefficient to require cable operators to install a separate infrastructure (poles, conduit, trenches) for their cable and cable system facilities. Where one infrastructure will suffice to serve both DTE Electric and cable operator serving the same area, a second infrastructure would be decidedly wasteful. Still, it would be inherently inequitable if cable operators were permitted to use DTE Electric's infrastructure without having to pay a reasonable sum for that use--that would, in essence, amount to DTE Electric's ratepayers subsidizing cable subscribers. But what constitutes a reasonable sum? Clearly, a reasonable sum would cover the additional costs that DTE Electric will incur as a result of cable and cable system facilities hanging on its poles (so to speak), plus some amount representing the value of the use of DTE Electric's assets (i.e., borrowing the assets for which DTE Electric has paid money is

no different than borrowing the money itself).

For present purposes, we need only concern ourselves with the additional costs that DTE Electric will incur as a result of cable equipment hanging on its poles. Importantly, the asymmetric and nonreciprocal indemnification provisions in DTE Electric's Joint Use Agreements impose indemnification obligations on the joint user only for damages, charges, costs, etc., that *arise directly or indirectly from* that party's **use** of DTE Electric's poles or other infrastructure. In other words, while a particular triggering event may not be the fault (legally speaking) of a joint user, the costs, charges, expenses, etc., flowing therefrom are ones that DTE Electric would not have incurred **but for** the presence of a joint user's cables on DTE Electric's poles.

Consequently, those anticipated costs are a legitimate component of what a joint user/cable operator should have to pay as part of the *price* of using DTE Electric's infrastructure. Otherwise, DTE Electric's ratepayers are bearing the burden of an externalized cost of providing cable subscribers with cable communication services. Hence, one way or another, whether through the per pole or per conduit foot prices that the cable operator has to pay, or by allocating these "but for" costs to the cable operator through nonreciprocal indemnification provisions, these are costs that any joint user should have to pay. Indeed, all that the parties need is a clear definition of who has the right to do what, and the market will take care of the rest. However, the Petitioner in the instant case (Mediacom) is advocating for the FCC to intercede and impose on the parties the least efficient manner for that result to be accomplished.

**Indemnification Without Regard to Fault Reduces Transactional Costs And
Therefore Reduces the Overall Costs of Providing Cable Communication Services**

Petitioner Mediacom apparently favors operating under a paradigm whereby pole owners and cable operator attachers each agree to indemnify the other when their respective negligence

causes harm or loss in an event that would not have occurred but for the cable operator's use of the utility poles. Under such a system, a pole owner such as DTE Electric could anticipate that some casualty events arising out of the cable operator's use will be the "fault" of the cable operator, while others will be deemed to be the "fault" of DTE Electric, for which DTE Electric would then have to pay for its liability and to hold the cable operator harmless. In anticipation of these increases to its costs arising out of permitting the joint use of its infrastructure, DTE Electric *could* predict the cost of the necessary insurance to cover its additional exposure to liability and any required increase in work, then simply charge the cable operator more on a per pole or per conduit foot basis in order to subsidize these increases. ..

Indeed, in a perfect world, changing from a program where the cable operator pays for losses occasioned by either party's fault (provided they arise out of the cable operator's use of the facilities) to one where the cable operator pays only for its own fault would likely be a zero sum game. That is, the cable operator would (presumably) pay less on average per transaction or occurrence (because it would sometimes be without fault) but it would have to pay commensurately more for the use of the infrastructure in compensation for the anticipated increase in operating costs to the pole owner.

However, it is not a perfect world. Experience demonstrates that in many, if not all, of the incidents that arise (on a "but for" causation basis) out of the cable operator's use of the facilities, there are disputes between the cable operator and the pole owner as to who is at fault and/or to what extent they are respectively at fault. These disputes, of necessity under a system where each party pays only for its own negligence (and indemnifies the other to the same extent), result in litigation between the cable operator and the pole owner. That litigation increases the overall cost of each transaction and occurrence to all parties.

By contrast, under a system where the cable operator has to hold the pole owner harmless without regard to fault, all of those litigation costs are eliminated. In the case of DTE Electric and its joint users, the cable operator is required to obtain insurance to cover its own liability as well as its contractually assumed liability. For purposes of that insurance, it makes no difference whether the fault is that of DTE or the cable operator. It is known up front that the cable operator will bear the cost burden of the insurance and, as a result, the price charged to cable operator is lower than it would otherwise have to be. Further, the litigation costs between DTE Electric and such cable operators are (substantially) eliminated, so the overall cost to cable operators of joint use is minimized.

A Contractual Provision Allocating Costs Is Not Unjust Or Unreasonable If Its Effect Was Contemplated As Part Of The Price Structure Of The Overall Contract

The perceived unfairness to Mediacom ostensibly demonstrated by the Iowa District Court case described in Mediacom's petition disappears when that occurrence is viewed in the broader context of the entire contractual relationship, and when one considers that the asymmetric and nonreciprocal indemnification duties imposed on Mediacom were within the contemplation of the Mediacom and IPL when they came to an agreement on price. What would not be "just and reasonable" would be for this Bureau to change the agreed-upon indemnification terms to those suggested by Mediacom without also raising the user fees that Mediacom is required to pay to IPL.

Conclusion

It is DTE Electric's position that the FCC should decline to issue the declaratory ruling being sought by Mediacom. Granting Mediacom's request would result in the least efficient and least equitable system of allocating the costs associated with attachment arrangements. In this context, indemnification without regard to fault is beneficial to each party, as it reduces

transactional costs and therefore reduces the overall costs of providing utility services. It also prevents the untransparent subsidization of the cost of cable, a discretionary commodity, by ratepayers of electricity, an essential commodity for most. Therefore, DTE Electric recommends that the FCC deny Mediacom's petition.

Respectfully submitted,

/s/ 

Randall L. Rutkofske,
General Counsel-DTE Electric Company

DTE ENERGY COMPANY
One Energy Plaza
Detroit, Michigan 48226

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